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In the Supreme Court
of the State of Utah FILED

APR 6 - 1959

CAROLYN SMITH,

Plaintiff and Appellant,

vs.

CLYDE G. SMITH,

Defendant and Respondent.

Clerk, Supreme Court, Utah

Case No.

9015

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BRIEF OF PLAINTIFF AND APPELLANT,
CAROLYN SMITH

TAYLOR, LUND & MOFFAT
By G. HAL TAYLOR and
FRANCIS C. LUND

Attorneys for Plaintiff and Appellant

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In the Supreme Court of the State of Utah

CAROLYN SMITH,

Plaintiff and Appellant,

vs.

CLYDE G. SMITH,

Defendant and Respondent.

Case No.
9015

BRIEF OF PLAINTIFF AND APPELLANT,
CAROLYN SMITH

STATEMENT OF FACTS

This is an action for divorce. The plaintiff filed the original complaint alleging mental cruelty, and requested that she be awarded the care, custody, and control of the minor children of the parties. The defendant, Clyde G. Smith, filed a counterclaim in which he alleged, as grounds for divorce, mental cruelty and requested that the custody of the minor children be awarded to him. The plaintiff replied, denying the counter-

claim. The action was tried on the 5th day of October, 1958, before the Honorable John F. Wahlquist, Judge of the District Court of Weber County, State of Utah.

The facts as produced at the trial are as follows: The plaintiff and defendant were married on the 17th day of January, 1953. Two children were born as issue of the marriage. The first, David Clyde Smith, was born on November 12, 1953, and the younger child, Connie Jean Smith, was born on May 1, 1956. The parties at all times during their marriage have had considerable financial difficulty and during most of the period the plaintiff worked in order to assist in the financial problems of the parties. The plaintiff testified that the actions of the defendant in not talking things over with her caused her great mental distress. The other evidence adduced at the trial concerned the misconduct of the plaintiff. The trial court found that the defendant had been subjected to great mental anguish and distress by the cruel treatment of the plaintiff in that she was guilty of gross misconduct in associating with and entertaining another man in the absence of the defendant and allowing such conduct to become common knowledge to the community in which the parties and their children lived. The evidence with regard to the misconduct of the plaintiff is in conflict. However, plaintiff concedes that the finding of the court that she was guilty of misconduct in associating with another man is sustained by the evidence.

At the conclusion of the evidence the trial court granted the divorce to the defendant on his counterclaim and made a statement concerning the custody of the children. The trial court indicated that unless the parties could work something

out on the custody whereby the plaintiff would live with her mother, that it was the court's intention to award the custody of the children to the father (Tr. 88). Thereafter the plaintiff called Mrs. Amy Bills, the plaintiff's mother, who testified that she would be willing to assist Mrs. Smith in the care and custody of the children. The trial court asked Mrs. Bills if she would submit to the jurisdiction of the court, and provide a place where plaintiff and the children could reside with her, and further agree that should the plaintiff move the children some place where Mrs. Bills could not be present to supervise them, that Mrs. Bills would notify Mr. Smith or Mr. Bingham. Mrs. Bills agreed (Tr. 90).

The findings of fact of the trial court (R. 16-17) makes no finding with regard to the fitness of the plaintiff to have the custody of the children. It does find that the defendant is at and proper person to have the care, custody, and control of the parties' minor children. As a conclusion of law, the court states:

"That the defendant is entitled to have awarded to him the care, custody and control of the parties' minor children; however, the plaintiff is allowed to keep the physical control of said minor children on condition that said plaintiff and the children live with the mother of the plaintiff and be subject to the supervision of plaintiff's mother in connection with the care of said minor children; that the defendant be granted the custody of said minor children during the months of June, July, and August of each and every year and is further awarded the right of reasonable visitation in connection with said children." (§2, R-17).

STATEMENT OF POINTS

POINT I.

THE COURT ERRED AS A MATTER OF LAW IN AWARDING THE DEFENDANT HUSBAND THE CARE, CUSTODY, AND CONTROL OF THE PARTIES' MINOR CHILDREN AND AT THE SAME TIME ALLOWING PLAINTIFF TO KEEP THE PHYSICAL CONTROL OF THE MINOR CHILDREN UPON CONDITION THAT THE CHILDREN LIVE WITH THE MOTHER OF THE PLAINTIFF BECAUSE SUCH AWARD DOES NOT TAKE INTO CONSIDERATION THE BEST INTERESTS OF THE CHILDREN AND DOES, IN EFFECT, AWARD THE CUSTODY TO THE GRANDMOTHER.

POINT II.

THE COURT ERRED AS A MATTER OF LAW IN GRANTING A SPLIT CUSTODY ARRANGEMENT WHEREBY THE DEFENDANT HUSBAND WAS GRANTED CUSTODY DURING THE MONTHS OF JUNE, JULY, AND AUGUST OF EACH YEAR BECAUSE THE INTEREST OF CHILDREN OF SUCH TENDER YEARS CANNOT BE BEST SERVED BY SUCH A SPLIT CUSTODY ARRANGEMENT.

POINT III.

THE COURT ERRED AS A MATTER OF LAW IN PROCEEDING TO JUDGMENT WITHOUT MAKING FINDINGS ON ALL OF THE ISSUES INVOLVED.

ARGUMENT

POINT I.

THE COURT ERRED AS A MATTER OF LAW IN AWARDING THE DEFENDANT HUSBAND THE CARE, CUSTODY, AND CONTROL OF THE PARTIES' MINOR CHILDREN AND AT THE SAME TIME ALLOWING PLAINTIFF TO KEEP THE PHYSICAL CONTROL OF THE MINOR CHILDREN UPON CONDITION THAT THE CHILDREN LIVE WITH THE MOTHER OF THE PLAINTIFF BECAUSE SUCH AWARD DOES NOT TAKE INTO CONSIDERATION THE BEST INTERESTS OF THE CHILDREN AND DOES, IN EFFECT, AWARD THE CUSTODY TO THE GRANDMOTHER.

The plaintiff's concern and primary purpose in making the appeal in this case is the welfare of her two children. The children are both of tender years. The trial court decree adopts what appears to be a novel theory and that is, that custody of the children can be in one party, the husband, and the physical control of the children in another, the mother. While the findings and decree of the trial court are not drawn in conformance with the court's statement, (Tr. 90) the trial court's statement does shed some light upon the court's thinking in this matter. The court stated:

"He is to pay the sum of Fifty Dollars a month to the clerk of the court downstairs which may be drawn by, I suppose as long as the grandmother has supervision of them, it may be paid to her, Fifty Dollars per month per child which will be a Hundred Dollars a month until further order of the court during the months that he does not have custody of the children with him."

The findings and decree, however, order the money to be paid to the plaintiff mother and grants to her physical possession of the children only so long as she is living with her mother. Such decree, we submit, restricts plaintiff's freedom of action and it in effect grants the custody of the children to the grandmother. This court has long recognized that where the custody of children of tender years are involved that ordinarily the best interests of such children will be served if custody of the children is granted to the mother. In the case of *Steiger vs. Steiger*, 4 Utah 2nd 273; 293 P2d. 418, the court held:

"This court has stated that a divorced mother has no absolute right to the custody of her minor children . . . but the policy of our decisions has been to give weight to the view that all things being equal, preference should be given to the mother in awarding custody of a child of tender years notwithstanding the divorce is granted to the father. . . . And this view is based upon the oftstated purpose of the award of custody to provide for the child's best interests and welfare."

While, as will be hereafter pointed out in Point III, no finding was made with regard to the fitness of the plaintiff mother to have the custody of the children and the evidence in the record would not sustain a finding that the mother is unfit to have custody, we admit for the moment and for the purpose of argument that taking the record as a whole and the conflicting testimony, the most that can be found with regard to the mother's actions was that she was indiscreet in transferring her affections from her husband to another man. This fact alone is not sufficient to deprive the mother of custody of her children nor is it sufficient to sustain a finding that she

is an unfit mother to have the custody of the children of such tender years.

In the case of *Holm vs. Holm*, 139 Pac. 937, this court considered a case in which the facts were not dissimilar from the case at bar. In that case the plaintiff mother sued for divorce on the grounds of failure to provide and habitual drunkenness and the defendant husband answered denying these allegations and counterclaimed on the grounds of adultery and cruelty. Most of the evidence which was adduced by the parties related to the issues presented on the counterclaim. However, the court did grant the divorce in that case to the plaintiff. The divorce was granted on the grounds of failure to provide, and the minor children were awarded to the plaintiff mother. The court recognized the doctrine that in divorce, it being an equity case, questions of law and fact could be reviewed. In the course of the discussion, the court posed the difficult question as to what disposition ought to be made of the children with regard to their custody. The court stated:

“Regardless of the question of whether the defendant’s legal right to their custody is paramount to that of the plaintiff, we think their interest because of their youth is best served with the mother at least temporarily.”

Again, in the case *Stuber vs. Stuber*, 244 P2d. 650, this court considered a divorce action in which the defendant husband sought a modification of the divorce decree allowing custody of the child to be placed in him on the grounds that the mother was an unfit person to have the custody of the child. At the time of the trial the mother had been living with

a married man who was separated from his wife and whom she expected to marry. The court, after considering the facts and the opinion of the trial court, held:

“The fact that she lived with a man whom she expected to marry, although censurable, does not in itself make her an unfit and improper person to have the custody of her child.”

POINT II.

THE COURT ERRED AS A MATTER OF LAW IN GRANTING A SPLIT CUSTODY ARRANGEMENT WHEREBY THE DEFENDANT HUSBAND WAS GRANTED CUSTODY DURING THE MONTHS OF JUNE, JULY, AND AUGUST OF EACH YEAR BECAUSE THE INTEREST OF CHILDREN OF SUCH TENDER YEARS CANNOT BE BEST SERVED BY SUCH A SPLIT CUSTODY ARRANGEMENT.

While this court has in other cases approved split custody arrangements, such approval has been based upon evidence and a finding by the court that it would be for the best interests of the minor children to enjoy the society of the father during the split custody period. See *Sampsell vs. Holt*, 202 P 2d. 550-554. Inasmuch as there is no finding and no evidence in the record with regard to what effect such split custody arrangement would have on the minor children, we submit that it would be to the best interests of the children, in the absence of further showing, that they be awarded to the mother. At a later date when the children are older, would be soon enough to have split custody. The court should be loathe to deprive

the mother, in this case, of the custody and control of these children of tender years. In considering what would be to the best interests of the children under the split custody arrangement herein decreed, the court should consider that during the three month period when the children are to be in the physical control of the husband, presumably the paternal grandmother or some other woman will be in the position of caring for the children. And, during the nine month period when the physical control of the children is granted to the mother, under the decree of the trial court two women — the mother and the maternal grandmother—will be in the position of caring for the children. Such arrangement, we submit, does not take into consideration the best interests and welfare of the children. In the case of *Steiger vs. Steiger*, supra, the trial court had awarded temporary custody of a minor child of the parties to the husband's mother and the court admonished that she was to teach the child to love its mother and granted the mother the right to take the child with her from Saturday noon until Monday morning each week and, also, granted her the right to take the child two nights each week for one hour each of said nights. This court stated:

“ . . . the result of the order is to place two women, defendant's mother and the plaintiff, in the position of caring for the child in the manner of a mother at different times, which can only result in confusion for a child so young. . . .

“Under circumstances without delineating in full the contradictory evidence on both sides, it would appear that the interests of the child would be best served by placing him with his mother under an appropriate order.”

We submit, therefore, that the custody of the children in this case should be awarded to the mother. There has been no showing that the plaintiff is grossly immoral or that she subjects the children to any abuse or neglects them. The evidence taken as a whole indicates that she is a good parent and can and will raise the children in a fit and proper manner.

POINT III.

THE COURT ERRED AS A MATTER OF LAW IN PROCEEDING TO JUDGMENT WITHOUT MAKING FINDINGS ON ALL OF THE ISSUES INVOLVED.

There are two specific issues in the case at bar upon which the court made no findings. First, no finding was made with regard to the fitness of the plaintiff mother to have the custody of the children. Second, no finding was made as to what would be to the best interests and welfare of the children in the matter of custody. That such findings are necessary is obvious. This court in the *Holm vs. Holm* case, *supra*, held:

“Of course the court could not properly proceed to judgment until findings were made on all issues. We have held that several times.”

CONCLUSION

The record is devoid of any evidence which would support a finding that it would be to the best interest and welfare of the children to affirm the trial court's decision with regard to custody. Upon this point the case should be remanded for the trial court to take additional evidence with regard

to what will be to the best interests and welfare of the children. We further submit that this court should instruct the trial court that in the absence of evidence that the mother is unfit to have custody of the children or that the best interests of the children would be served by an award of custody to the father, that the custody of the minor children who are of tender years should be awarded to the mother.

Respectfully submitted,

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